M & M Building and Electrical Contractors, Inc., d/b/a M & M Contractors *and* Carpenters Local No. 266, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 32-CA-3254

July 30, 1982

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

DECISION AND ORDER

On November 23, 1981, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

Members Fanning and Zimmerman note the following in adopting the finding that Respondent's unilateral implementation of changes did not violate Section 8(a)(5). When a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, an employer may be justified in implementing unilateral changes in the terms and conditions of employment. See, e.g., *AAA Motor Lines, Inc.*, 215 NLRB 793 (1974). However, before imposing any changes, an employer, as a part of demonstrating its diligence and good faith, must present the union with its detailed contract proposals and permit the union a reasonable time to evaluate the proposals. Here, Respondent's unilateral implementation of the changes in the terms and conditions of employment occurred only 5 days after the Union had received the employer's written detailed contract proposal but also after the Union over a period of 7 months had clearly manifested its aversion to bargaining with Respondent. Normally, an employer must allow a union more than the 5-day period, present in this case, between the time the union receives the employer's proposed contract changes and the time the employer implements those changes. However, in light of the particular circumstances present here, especially the Union's refusal from April to early November to give Respondent a date on which it would meet to bargain, and the Union's early November demands for an immediate meeting followed by refusal and delay in setting up a meeting date, Members Fanning and Zimmerman agree that Respondent did not violate Section 8(a)(5) by implementing on November 24 the changes which had been proposed on November 19.

Chairman Van de Water concurs in the result reached herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, M & M Building and Electrical Contractors, Inc., d/b/a M & M Contractors, Stockton, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Stockton, California, on July 21 and 22, 1981. On January 23, 1981, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing, based upon unfair labor practice charge filed on December 10, 1980, alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.*, herein called the Act. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs filed on behalf of the parties, and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material, M & M Building and Electrical Contractors, Inc. d/b/a M & M Contractors, herein called Respondent, has been a California corporation with an office and place of business in Stockton, California, and has been engaged in performing nonretail framing and electrical work in the construction industry. During the 12-month period prior to issuance of the complaint, Respondent, in the course and conduct of its business operations, sold goods and services valued in excess of $50,000 to customers or business enterprises within the State of California, which customers or business enterprises themselves met one of the Board's jurisdictional standards, other than the indirect inflow or outflow standards. In view of these factors, I find that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, Carpenters Local No. 266, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

While this record consists of a significant amount of evidence pertaining to identities of employees employed on specific projects during particular time periods from May 1979 through December 1980, most of that evidence need not be recited in detail in view of the issues posed in the briefs. Prior to early 1979, Joseph Maldonado, Jr., and Rick Michelsen had been operating as a general partnership performing primarily small framing and electrical jobs.[1] They had not hired any employees, but had rather been performing all the work themselves. However, in early 1979, their partnership had been awarded a subcontract for the performance of certain framing and rough carpentry work on phase I of the Grand Canal Apartments project in Stockton. This project was of sufficient magnitude to require that employees be hired to perform it. After arranging for certain individuals to be hired once work was scheduled to commence, Maldonado, on behalf of the partnership, executed a collective-bargaining agreement whereby the Union became the collective-bargaining representative of employees in an appropriate bargaining unit of all full-time and regular part-time employees; excluding office clerical employees, guards, and supervisors as defined in the Act. The date of execution written on that agreement is May 1, 1979. It had a stated expiration date of June 15, 1980.

Between May 1979 and June 1980, the partnership performed a total of four projects on which it employed employees.[2] In addition to those employees who had already been active union members when hired by Maldonado and Michelsen, all employees whom they hired either became members of the Union or became current in their union membership standing pursuant to the union-security clause in the collective-bargaining agreement. From July until December 1980, no employees were hired; only Maldonado and Michelsen worked on projects for which Respondent had bid successfully. However, the partners had continued to bid for work on projects and, in November 1980, were successful in obtaining a contract for work on the Brookside Condominiums followed by one for work to be performed in Fairfield, California. In late November 1980, the partnership hired one employee for the Brookside project. Then, on November 3, Respondent hired eight employees to work on the project in Fairfield. On succeeding dates in that same month, a total of 25 additional employees were hired to work there. Moreover, on December 17, two more employees were hired to work for Respondent on the Brookside project.

As noted above, the collective-bargaining agreement had expired on June 15, 1980.[3] On April 14, William A. Schuckman, attorney for the partners, wrote a letter seeking to initiate negotiations for a new collective-bargaining agreement. As detailed further below, a chain of correspondence pertaining to this subject then followed, leading to a November 26 letter by Schuckman in which he withdrew recognition of the Union as the representative of Respondent's employees in the above-described bargaining unit and, further, announced implementation of certain changes in terms and conditions of employment of those employees. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally making these changes in terms and conditions of employment and by withdrawing recognition of the Union. Respondent, conversely, states in its brief that it

> is asserting two principle [sic] defenses in this action, each of which is sufficient to warrant the complete dismissal of the General Counsel's Complaint. First, Respondent contends that it did in fact lawfully bargain to impasse with the Union no later than November 21, 1980. Second, Respondent contends that it had sufficient objective grounds for doubting the Union's majority status as of November 26, 1980, and furthermore, that the Union had *in fact* lost the support of a majority of the employees in the unit of [Respondent's] carpentry employees as of that date.

I find that a preponderance of the evidence supports the General Counsel's allegation that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union, but I further find that a preponderance of the evidence will not support the conclusion that Respondent violated the Act by implementing the changes in terms and conditions of employment which it did.

B. *The Correspondence Between the Parties*

In his letter of April 14, sent to Delta-Yosemite District Council of Carpenters, herein called Delta-Yosemite, Schuckman requested that negotiations be commenced for a collective-bargaining agreement to succeed the one scheduled to expire on June 15. By letter dated April 16, Delta-Yosemite Business Representative Donald L. Stewart replied that, to be effective, notices pertaining to the collective-bargaining agreement had to be submitted to the Carpenters 46 Northern California Counties Conference Board, herein called Conference Board, for which Delta-Yosemite was "not authorized to accept communications . . . ." By letter, bearing the same date as Stewart's letter, Lawrence E. Bee, executive director of the Conference Board, notified Maldon-

[1] In approximately the summer of 1980, Maldonado and Michelsen became incorporated as Respondent.

[2] Phase I of the Grand Canal Apartments project lasted until the end of 1979. Phase II of that same project lasted from approximately January 2 through April 1, 1980. The partnership also performed work on the Cookbook Restaurant project from February 26 to June 5, 1980, and on the Benjamin Holt Office Building project from April 27 through June 1980.

[3] Unless otherwise stated all dates hereafter occurred in 1980.

ado and Michelson that their collective-bargaining agreement had been opened for negotiation "with the appropriate signatory Association" and that, upon conclusion of those negotiations, the partners would receive "a summary of the changes, amendments, modifications, extensions and/or renewals to said Agreements [sic]."[4] On April 18, Schuckman sent a letter to Bee, reciting the same substantive communication as had been contained in his letter sent to Delta-Yosemite on April 14. Further, on May 9, he replied directly to Bee's letter, by sending a letter which denied that the partnership was part of any association and which, again, offered to meet for negotiations.

Because Schukman's April 18 letter had been misfiled, not until August 11 did Bee, having come across Schuckman's letter in the file of another employer, reply to it.[5] In his letter of August 11, Bee stated that the April 18 letter from Schuckman had been "received in this office after the contractual cutoff and therefore was untimely." Schuckman had started his vacation on August 11 and did not return to his office until the last Monday in that month, at which point he had found himself confronting "a mountain of letters and work on [his] desk." Thus it had not been until September 16, "in the ordinary course of trying to dig out from [his] vacation," that he had replied to the August 11 letter. In a letter dated September 16, Schuckman stated that the April notice had been served in a timely fashion, pointed out that Respondent had not received any response to his previous offer to negotiate separately, and asserted that Respondent stood ready to negotiate "at any time mutually convenient." However, this letter also went unanswered by the Conference Board.

Instead, Bee had attempted to contact Maldonado directly by telephone.[6] Maldonado referred these messages, left when Bee called, to Schuckman who, as Respondent's representative, attempted to return those telephone calls. However, as Schuckman phrased it, "We weren't able to get together by phone."[7] Finally, Schuckman sent a letter, dated October 8, to the Conference Board stating that Bee had been unavailable when efforts had been made to return his (Bee's) telephone calls and that Respondent "continue[s] to stand ready to negotiate with you . . . at any time mutually convenient." However, Schuckman received no response to this letter during the remainder of the month of October.

On November 5, Michael B. Roger, counsel for the Charging Party, sent a letter to Schuckman demanding, on behalf of the Conference Board, "an immediate meeting for purposes of collective-bargaining," and instructing Schuckman to "contact Mel Ward, Delta-Yosemite District Council of Carpenters . . . as to your available dates when said meeting may be scheduled."[8] Roger's letter shows that a carbon copy of it had been sent to Ward specifically, as well as to Bee. In addition, by telegram to Respondent, dated November 12, Ward demanded that he be contacted to arrange "an immediate meeting . . . ."

During early November, Schuckman had been involved in trials in cities other than the one in which his office is located. Thus, not until Friday, November 14, was he able to review the correspondence that had been received in his absence. During the afternoon of that same day, he telephoned Ward to arrange for a meeting. However, when Ward ascertained that Schuckman was an attorney, he terminated further discussion of the matter and instructed Schuckman to contact Roger.[9]

Schuckman's efforts to reach Roger during the remainder of November 14 proved unsuccessful. Accordingly, he sent Roger a telegram, explaining what Ward had said and, as a "preliminary offer," stating that Respondent would accept the terms of the master agreement, already negotiated with other employers, "With the exception of wage and fringe package and with further exception of paragraph 50 relating to non-union and subcontractors." In the telegram, Schuckman also stated that this offer would remain open until noon on November 17.

On Monday, November 17, Schuckman renewed his efforts to attempt to reach Roger by telephone, but was unable to do so. By this point, testified Schuckman, Respondent "was in need of hard data . . . as to what his labor costs were going to be. That's a substantial portion of his overhead in his business. It's almost all of it." Moreover, Schuckman felt that, after 6 months of unsuccessful efforts to institute negotiations, "I had finally managed to get something going" and "I wanted to try to keep them moving. I was trying to light the fires up in getting them going." Thus, he sent a mailgram to Roger, reciting that Respondent had attempted to institute negotiations "on several occasions including 4 telephone calls to your office on 11-17-80," and stating that the terms recited in the November 14 telegram should be considered a final offer which would be implemented on November 19 if he was not contacted on November 18. This approach proved effective, for on November 18 he finally received a telephone call from Roger.

[4] During the hearing, counsel for the Charging Party stated that its position was that there had been no timely withdrawal from association-wide bargaining by the partnership and, accordingly, that Respondent was not entitled to bargain separately. Counsel for the General Counsel, however, stated that it was the General Counsel's position that timely and effective notice had been given. Inasmuch as the timeliness of the notice is not an issue posed by the complaint, this is a question that need not be and is not addressed in this Decision.

[5] Bee did not deny having received Schuckman's May 9 letter, but no explanation was advanced for having failed to respond to it.

[6] Bee testified that he had made these attempts to contact Maldonado because "I knew a Joseph Maldonado [who] was a member of Local Union 668 in Palo Alto. And I was just wondering if it was the same Joseph Maldonado, and if it was, I figured I could talk to him about what the real status was."

[7] Bee acknowledged that, during this period, Schuckman had placed "[t]wo or three calls" to Bee, but did not claim to have returned those calls and did not explain his reason for having failed to do so.

[8] Roger explained:

> The reason why I was told to contact M & M. as my understanding was, there was a problem, some question pertaining to whether or not M & M was bound to the agreement, or was living up to the agreement, or was contending they weren't bound and entitled to negotiate.
>
> That was what I put into context as the problem. We were trying to resolve that problem.

[9] Roger testified that "the policy we had undertaken since April was that when employers were represented by counsel, and if those counsel were strangers to the Union representatives, that the matters were to be turned over to the Union's counsel—myself—for followup."

Schuckman testified that there had been two telephone conversations, one on November 18 and another on November 19, between Roger and himself. Roger testified that he believed that there had been only a single conversation during which substantive issues had been discussed, although he conceded that he was not 100 percent certain of that fact and, in addition, testified that he believed that he had "had another conversation with [Schuckman] trying to establish the time and place for a face-to-face meeting." However, both attorneys agreed that Schuckman had proposed "$10 an hour with no fringes," as Roger put it,[10] and elimination of the subcontracting provision. Moreover, Schuckman testified that, at the conclusion of the November 19 telephone conversation, he had suggested a number of dates between November 20 and 25 for scheduling "an immediate meeting" and that he had asked Roger to speak to his client regarding the acceptability of these dates. According to Schuckman, Roger had promised to do so and to "get back to me that afternoon." Roger agreed that he had promised "to call [Schuckman] to establish a date for a meeting." At no point was it disputed that Roger had promised to "get back" to Schuckman, regarding the date for such a meeting, during the afternoon of November 19.

However, Roger never did call Schuckman during the remainder of the afternoon of November 19, following their telephone conversation.[11] Having not received the promised telephone call from Roger, Schuckman sent him a mailgram, summarizing that Respondent was offering a wage rate of $10 per hour for journeyman carpenters with porportional rates to be paid to other classifications, cessation of fringe benefit contributions, and elimination of the restrictions on subcontracting contained in paragraph 50 of the master agreement. In the mailgram, Schuckman also recited that Roger had promised to contact his client and to call during the afternoon of November 19 to report on an acceptable date for a meeting, and then stated:

> When you failed to contact me as promised, I phoned and was advised you were no longer in. It is self-evident that you are refusing to negotiate in good faith and that in fact an impasse has been reached. We therefore demand in person negotiations no later than 11/21/80. If those negotiations do not occur, we will assume that an impasse has occurred—and proceed accordingly.

Roger testified that he had not received this mailgram until after he had dictated a letter to Schuckman on Thursday, November 20, relating that his clients "have advised me that they are not available until the week of December 8, 1980, for purposes of meeting in Stockton with respect to collective bargaining." Nevertheless, on that same morning, picketing had commenced at the Brookside Condominium project site, where apparently Maldonado and Michelsen themselves were working, with signs accusing Respondent of having committed unfair labor practices.

Having observed the pickets on November 20, Schuckman sent a mailgram to Roger that same day, noting the existence of the picketing, pointing out that as of 1:30 p.m. that day Roger still had failed to call as promised, and asserting that Respondent interpreted these events as rejections of Respondent's proposals, with the result that an impasse had been reached.[12] No response was received to Schuckman's November 20 mailgram. Although Roger had dictated the above-described letter on November 20, his secretary had not gotten around to typing and sending it until November 24. When Schuckman ultimately received it, he sent a reply, dated November 26, in which he stated:

> This letter is in response to yours of November 24, 1980.
>
> Beginning with our letter dated April 14, 1980 and hand delivered to Mr. Robert J. Scott that day, we have attempted to initiate good faith negotiations with either you or your clients. We have made written offers to meet and negotiate on the following dates:
>
> April 14, 1980
> April 18, 1980
> May 9, 1980
> September 16, 1980
> October 8, 1980
> November 14, 1980
> November 17, 1980
> November 19, 1980
> November 20, 1980
>
> We feel that prior to November 21, 1980, we made every conceivable effort to initiate good faith negotiations and that you have systematically ignored our communications, failed to respond when and as promised and procrastinated.
>
> As a result, we concluded on November 20, 1980, that an impasse had been reached and on November 24, 1980, implemented our offer of November 19, 1980.
>
> Since this matter is at impasse, no further negotiations are required.
>
> In addition, we have reasonable and good faith cause to believe that the majority of M & M's employees do not wish to be represented by your union so that we have no obligation to attempt further negotiations.

Schuckman testified that he had taken the position set forth in this letter:

[10] With regard to alternative wage rates, Roger testified that "I told him it would be easiest if he simply contacted Mel Ward, who was the District Council Secretary, because he knew exactly what the rates were." Of course, Schuckman already had attempted to talk with Ward, but without success.

[11] In fact, Roger did not discuss the matter with his client until at least Thursday, November 20.

[12] Asked to explain his reasons for having reached this latter conclusion, Schuckman testified that he had done so because of the picketing taken in conjunction with Roger's failure to call back as promised: "My thought was that he had in fact reached his principals, and that's why they'd put up the pickets and had not chosen to call me back, had chosen to communicate with me by putting up pickets."

Because—primarily because—I felt that, number one, I was entitled to some response to my —the specific offer that I had made, and that was embodied in the 11/19/80 telegram, G.C. Exhibit (n) as in Nancy.

And second, it was—these negotiations were to begin not sooner than two weeks after the sending of the November 24th letter, not sooner than that.

That was the Monday of that week. And so they were going to be somewhere between two and three weeks in the future. And the alleged reason for that in the letter was that that was when it would be convenient with Mel Ward and that group to come and negotiate.

But when I tried to contact Mel Ward and that group, they had referred me to Roger. So when I went to talk to them I was supposed to talk to Roger. When I was supposed to talk to Roger, then I can't talk to him because I'm supposed to wait for them.

So it was going back and forth. And I really throught I was getting the run-around.

With respect to the withdrawal of recognition, Maldonado testified that primarily two factors had let him to believe that a majority of the employees no longer supported the incumbent representative and that, in turn, those factors had led him to instruct Schuckman to notify the Union that Respondent was withdrawing recognition: first, "that some of the apprentices . . . had dropped from the apprenticeship program," and second, that "a lot of fellows were working for other companies which were non-union."[13]

Analysis

With regard to Respondent's changes in wages, fringe benefit contributions, and subcontracting restrictions on November 24, the parties, in their briefs, have argued that the threshold issue which must be addressed to resolve the legality of those changes is whether an impasse had been reached before they had been implemented. In the broadest sense, this is accurate. The lawfulness of changes made in employment terms during negotiations is usually dependent upon whether an impasse has occurred. *Winn-Dixie Stores, Inc.*, 243 NLRB 972, 974 (1979). Determination of whether an impasse exists, in turn, is usually dependent upon whether there is a "realistic possibility that continuation of discussion . . . would have been fruitful." *American Federation of Television and Radio Artists, AFL–CIO, Kansas City Local [Taft Broadcasting Co.]* v. *N.L.R.B.*, 395 F.2d 622, 628 (D.C. Cir. 1968). Yet, before the issue of impasse becomes ripe for resolution, there first must be meaningful negotiations which can be assessed to determine if continued discussion "would have been fruitful." "Thus, a genuine impasse . . . is merely a point at which the parties cease to negotiate . . . ." *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), reversed on other grounds 500 F.2d 181 (5th Cir. 1974).

In the circumstances presented in this case, it can hardly be argued with any degree of persuasion, much less concluded, that meaningful negotiations—"discussion with an open and fair mind, and a sincere purpose to find a basis of agreement . . . ." *Globe Cotton Mills* v. *N.L.R.B.*, 103 F.2d 91, 94 (5th Cir. 1939)—had occurred. Responsibility for that failure hardly can be laid at Respondent's doorstep. For it simply cannot be concluded that Respondent had failed to *attempt* to bargain about them. Prior to actual commencement of contract negotiations, an employer seeking to make changes in terms and conditions of employment is obliged only to give notice of that desire to its employees' bargaining representative. Thereafter, "it is incumbent upon a union which has notice of an employer's proposed change in terms and conditions of employment to timely request bargaining in order to pursue its right to bargain on that subject." *Citizens National Bank of Willmar*, 245 NLRB 389, 389–390 (1979).[14] Where an employer has been rebuffed over a prolonged period in its efforts to diligently and earnestly seek bargaining sessions, and, at least, demonstrates that a valid economic reason exists for instituting changes already submitted to the bargaining representative as proposals, no violation of the Act is committed by implementing those proposals, absent evidence showing that an unlawful motive existed for having done so. *AAA Motor Lines, Inc.*, 215 NLRB 793 (1974); cf. *Mountaineer Excavating Co., Inc.*, 241 NLRB 414 (1979).

Here, at the time that Respondent had implemented the changes in wage rates, fringe benefit contributions, and subcontracting restrictions, it had been confronting the same silence—as a result of the broken promise to telephone Schuckman during the afternoon of November 19 and of the absence of any other expression, between that date and the one on which the changes were implemented, of willingness to participate in a negotiating meeting—that, for the most part, had greeted its overtures to bargain during the preceding 7-month period. Viewed from Respondent's perspective on November 24 there was no objective basis for concluding that further delay in making these changes would be any more fruitful in generating commencement of negotiations.

In his brief, counsel for the General Counsel asserts that "neither party aggressively pursued a meeting for purposes of collective bargaining until early November, 1980." Clearly, that assertion mischaracterizes what had been occurring from April to November 5. For, as summarized in Schuckman's above-quoted letter of November 26, Respondent had made a number of efforts to initiate negotiations during that 6-1/2-month period. However, most of these efforts had been ignored flatly. True, Schuckman's April 18 letter had been misfiled. But, at no point, so far as the record discloses, had that been explained to Schuckman once the letter had been discovered by Bee. Instead, Bee had responded only that

[13] While Maldonado listed other reasons at various points in his testimony and in a pretrial affidavit, it is clear from the above-quoted testimony that he replied primarily on those two reasons and that the others were mere afterthoughts.

[14] Of course, once negotiations for a collective-bargaining agreement are sought or have actually commenced and are in progress, with meetings occurring and discussions actually taking place, a different analysis is applicable. See *Winn-Dixie Stores, supra.*

Schuckman's letter had been "untimely" received. Moreover, the misfiling of that single letter hardly explains the failure to reply to Schuckman's communications of May 9, September 16, and October 8. Against that background of silence, Schuckman's failure to receive the promised telephone call, specifying a date for commencement of negotiations, understandably had a ring of *deja vu*.[15]

It might be argued that inasmuch as Roger's November 24 letter had been received by Schuckman at a point in time so proximate to implementation of the changes in employment terms, this expression of willingness to bargain should suffice to stay Respondent's ability to continue applying the implemented changes until bargaining could be conducted. Yet, the letter stated that the Union's agents would not be "available until the week of December 8, 1980, for the purpose of meeting . . . with respect to collective bargaining." Thus, in effect ignoring its own demand for "an immediate meeting," the Union was attempting to further postpone commencement of bargaining for almost a 2-week period from the date of Roger's letter and for over 1 month after the November 5 demand that bargaining be commenced immediately—to a point in time almost 9 months after Respondent had first sought to conduct negotiations. Consequently, while Roger's letter had been received at a time proximate to implementation of the changes, the date that it suggested for initiating bargaining had not been similarly proximate.

Much is made of the role played by Schuckman's vacation and subsequent almost 3-week period catching up from it, as well as of his November trial schedule, in causing delays in meeting by the parties. Yet, it can hardly be concluded that the former impeded negotiations. In his August 11 letter, Bee had taken the position that no obligation to bargain separately with Respondent existed due to the purportedly untimely receipt of Schuckman's April 18 letter—hardly an invitation to bargain. Moreover, silence had been the response greeting Schuckman's renewed offer to commence negotiations, made both in the letter replying to Bee's August 11 letter and in a subsequent letter dated October 8. With respect to Schuckman's November trial schedule, it is true that, not suprisingly, after having sent his October 8 letter, Schuckman had not sat waiting for the Conference Board to pick and choose when, if ever, it would decide, to dignify his bargaining invitations with a response. However, on November 14—9 days after the date shown on Roger's letter and 2 days after the date shown on Ward's telegram—Schuckman did reply to the demands for "an immediate meeting." Given the background here, that 9-day delay can hardly be viewed as having been significant. Moreover, there is no evidence that Schuckman would not have been available to meet for negotiations on any date during the remainder of November. To the contrary, it is undisputed that Schuckman had offered to meet on November 20, 21, 22, 24, and 25. However, when he attempted to contact Roger, as instructed by Ward, Schuckman's telephone calls were greeted by the all too familiar silence that had characterized his earlier efforts to initiate negotiations. Consequently, it hardly can be said that either Schuckman's vacation or his November trial schedule had any adverse impact on Respondent's ability to meet to conduct negotiations.

Given the history leading up to the receipt of the November 24 letter, there were additional reasons for Schuckman to have been suspicious concerning whether the Union truly intended to initiate negotiations and for him to believe that he "was getting the run-around." From the very beginning, Schuckman had been yo-yo'd from one agent of the Union to another when he had attempted to initiate negotiations. Thus, in response to his April 14 letter, he had been told that Delta-Yosemite was not the proper party for receipt of such notices and had been instructed by Delta-Yosemite to contact the Conference Board instead. In Bee's August 11 letter, Schuckman was instructed to contact Conference Board's attorney if he had "any further comments in this matter . . . ." But in his November 5 letter, the Conference Board's attorney had instructed Schuckman to contact Ward, an official of Delta-Yosemite. That, of course, had been the very entity that had led Schuckman to believe, in its April 16 letter, that it was not involved in the negotiating process. Then, when Schuckman did contact Ward, the latter told him to contact Roger instead. But, during a telephone conversation, the latter, as set forth in footnote 10, *supra*, had said that it would be easiest if Schuckman contacted Ward directly regarding alternative wage rates. Given this scenario, it is hardly suprising that Schuckman had become concerned that he was "getting the run-around" by the Union.

Obviously it is understandable that a party would desire to have its own attorney conduct negotiations with the other side, when the latter is represented by counsel. Yet, so far as the record discloses, it had been no secret by November that Schuckman was an attorney and Roger obviously had been aware of the Union's policy regarding attorneys. These two factors surely provide some basis either for Roger to have requested that he personally be contacted by Schuckman or to have alerted Ward to deal with Schuckman in, at least, arranging a date for the meeting sought by the latter. Indeed, Ward is shown on the November 5 letter as having been sent a carbon copy of it and, thus, presumably was aware that he had been the person that Roger had instructed

[15] Of course, Roger had not contacted his client on November 19, and, accordingly, had no meeting date to report to Schuckman during the afternoon of that day. Yet, Schuckman could hardly have been expected to have been aware of that fact. All he knew was that a veil of nonresponse had once more settled over his efforts to initiate bargaining. Moreover, that Roger did not contact his client until November 20 hardly serves to excuse his failure to attempt to telephone Schuckman on that date with regard to the time at which bargaining could commence. Certainly Roger must have had time to do so, inasmuch as he had taken time to dictate a letter to Schuckman reciting this information. Even assuming *arguendo* that Roger had been unable to make such a call on November 20 and 21, certainly he could have instructed Ward to call Schuckman for the limited purpose of advising the latter when the first bargaining meeting could be conducted. The crucial points here are that it had been the Union and its agents that had demanded "an immediate meeting" and, once Schuckman had replied by suggesting an array of dates within the next week for doing so, that it had been Roger who had made the promise to telephone Schuckman with an answer concerning when a meeting could be conducted. Surely, in these circumstances, blame for the renewed procrastination of the employees' bargaining representative can hardly be assessed against Respondent.

Schuckman to contact. Inasmuch as that also was obvious to Schuckman from his own copy of the letter, Ward's direction, when Schuckman telephoned him, that Roger instead be contacted can only have contributed to Schuckman's belief that he was being given "the runaround." Moreover, if Schuckman had been expected to observe the Union's policy of dealing through counsel, reciprocal respect was hardly shown for Respondent's desire to have Schuckman act as its bargaining representative. So far as the record discloses, Bee made not a single effort to contact Schuckman upon receipt of the latter's letters of September 16 and October 8. Instead, Bee simply ignored those letters, as well as the messages left as a result of Schuckman's telephone calls, and attempted to speak directly with Maldonado to ascertain if "I could talk to him about what the real status was."

An additional deficiency in Roger's November 24 suggestion that, in effect, commencement of negotiations be deferred until the week of December 8 arises from the nature of Respondent's situation. As set forth above, after a summer and fall of minimal business activity, Respondent had continued bidding for work on projects. Ultimately, it had obtained subcontracts for the Brookside Condominium and for a project in Fairfield. As Schuckman explained, the items about which he had been attempting to negotiate with the Union were ones that affected Respondent's labor costs, which represent "almost all" of Respondent's business expenses. The necessity for a construction industry employer, such as Respondent, to know its labor costs in order to make estimates for bids on projects had been one of the "two aspects peculiar to the building trades that Congress apparently thought justified the use of pre-hire agreements with unions that did not then represent a majority of the employees . . . ." *N.L.R.B.* v. *Local Union No. 103, International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO, et al.* [*Higdon Construction Co.*], 434 U.S. 335, 348 (1978). Consequently, further postponement of commencement of negotiations would, by virtue of the congressionally recognized nature of the industry in which Respondent conducted business, simply have prolonged the uncertainty created in Respondent's bidding as a result of the Union's unwillingness to initiate bargaining.

The changes effected by Respondent were consistent with the proposals which it had made in its mailgrams and over the telephone to Roger. It is, of course, accurate that Respondent had not made any proposals before November. However, as Schuckman explained, no proposals had been made until November because "I didn't see any point in sending officer [sic] off into the blue, when . . . nobody was even willing to negotiate with me." In his brief, the General Counsel characterizes the November proposals as having been "exploratory, preliminary to the true proposal submission . . . ." Indeed, Schuckman, himself, described his November 14 offer as having been "a preliminary proposal . . . ." Nevertheless, he testified that his proposals regarding wages, fringe benefits, and elimination of subcontracting restrictions had been serious ones. At no point has any party argued that Respondent's motivation in having made these proposals had been insincere or motivated by unlawful considerations. True, there had not been any in-depth discussion of them. Possibly Respondent might have been willing to abandon or to modify them in some degree if negotiations had been conducted. However, the fault for the lack of in-depth discussion and for the absence of negotiations regarding these proposals lies not with Respondent. Rather, based on the situation confronting Schuckman on November 24, the Union and its agents simply had displayed no interest in meeting to negotiate concerning these matters. Thus, it is the Union, itself, that was at fault for whatever deficiencies and ambiguities may have existed in these areas.

Whether or not the Union's conduct rises to the level of a violation of Section 8(b)(3) of the Act is not an issue presented by this case. Further, it is not profitable to speculate regarding whether or not, all along, the Union's disregard of Schuckman's bargaining requests had been intended as a vehicle to buy time during which Respondent could be persuaded or forced into accepting the terms of the master agreement, without the need for separate negotiations. Certainly, Roger's description of what he had been told by his client, as set forth in footnote 8, *supra*, tends to indicate that the Union did not intend to negotiate a separate collective-bargaining agreement, differing from the master agreement, with Respondent.

What is clear is that Respondent has not been shown to have harbored hostility toward the concept of collective bargaining nor toward the bargaining representative of its employees. Over a 7-month period it had made diligent and earnest efforts to initiate negotiations with its employees' collective-bargaining representative for an agreement to succeed the one that had expired in June. Because of the high proportion of its costs that labor represented and in light of its need to be certain of its costs in order to bid intelligently for contracts, it had need to resolve those economic issues about which it had been attempting to negotiate. Its efforts to do so had been met with silence and with actions that gave it a reasonable basis for concluding that it was "getting the runaround." In these circumstances, at the time that it implemented the changes Respondent had an objective basis for concluding that further delay would not be fruitful in resolving these issues. The changes that were made were consistent with the proposals that had been made to the Union by Respondent. In these circumstances I find that Respondent did not violate Section 8(a)(5) and (1) of the Act by making the changes implemented in mid-November. *AAA Motor Lines, Inc., supra.*

If, however, Respondent did not violate the Act in making the November changes, it surely did so when it refused to bargain further with the Union and withdrew recognition from it. At the outset, it is worth noting that, while Schuckman had included the withdrawal of recognition announcement in his November 26 letter, at no point did he testify concerning the reasons for having done so. Thus, he did not corroborate Maldonado's account of the factors that had led the latter to instruct Schuckman to notify Roger that recognition was being withdrawn. When he testified regarding this subject, Maldonado did not appear to be doing so in a candid

fashion. In contrast to his testimony in other areas, his hesitant and, at times, inconsistent position left the impression that his decision to withdraw recognition had been based in pique at the Union's reaction to Respondent's efforts to generate negotiations, rather than on a genuinely held conviction that there was a lack of employee support for the incumbent bargaining representative.

For an employer to lawfully withdraw recognition from an incumbent bargaining representative, its doubt of that representative's continued majority status must "be asserted in good faith . . . ." *Clear Pine Mouldings, Inc.* v. *N.L.R.B.*, 632 F.2d 721 (9th Cir. 1980). Even if a union's conduct has rise to the level of a violation of Section 8(b)(3) of the Act, that unlawful conduct would not privilege an employer with whom that union is bargaining, to withdraw recognition from it. For "the Act plainly does not contemplate that a refusal by a union to bargain at one time operates to absolve an employer from obeying the mandate of the Act to bargain collectively on any subsequent occasion." *Times Publishing Company, et al.*, 72 NLRB 676, 683 (1947). Similarly, the existence of an impasse does not entitle an employer to withdraw recognition from the bargaining representative of its employees. *International Medication Systems, Ltd.*, 253 NLRB 863, fn. 2 (1980). Consequently, while they serve to permit Respondent to make the changes which it did and although they might well have supported a valid unfair labor practices charge, the difficulties caused by the Union and its agents in commencing negotiations did not allow Respondent to withdraw recognition from it as the collective-bargaining representative of Respondent's employees.

In its brief, Respondent contends both that it had a reasonably based doubt of the Union's continued majority support and that the Union no longer, in fact, enjoyed the support of a majority of the employees in the bargaining unit. In making this contention, Respondent points to two factors: that many employees were working for nonunion contractors and that many of them had ceased paying union dues.[16] However, there is simply no relationship between these two factors and the contentions made by Respondent. As is true where employees return to work during a strike, accepting work from a nonunion contractor, of itself, "may mean no more than that [they were] forced to [accept] work for financial reasons . . . ." *Pennco. Inc.*, 250 NLRB 716, 718 (1980). Similarly, "[t]here is no necessary correlation between membership and the number of union supporters since no one could know how many employees who favor union bargaining do not become or remain members thereof." *Terrell Machine Company*, 173 NLRB 1480, 1481 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970). Accord: *Orion Corporation* v. *N.L.R.B.*, 515 F.2d 81, 84 (7th Cir. 1975). While Maldonado referred to other factors which assertedly supported his instruction to withdraw recognition from the Union, these appeared to have been advanced as mere afterthoughts designed to fortify the action which he had instructed Schuckman to take. Accordingly, they are not entitled to any consideration and, in any event, do not constitute the types of objective considerations that would support a valid withdrawal of recognition.

Therefore, I find that, on and after November 26, Respondent did violate Section 8(a)(5) and (1) of the Act by refusing to bargain with and by withdrawing recognition from the Union as the collective-bargaining representative of its employees.

[16] It is worth noting that these reasons advanced in Respondent's brief do not correspond precisely with the above-quoted testimony of Maldonado regarding his reasons for having withdrawn recognition. For Maldonado testified that, at the time that he had instructed Schuckman to do so, he had known only that a number of employees were no longer participating in the Union's apprenticeship programs and that many of the Union's members were working for nonunion contractors.

CONCLUSIONS OF LAW

1. M & M Building and Electrical Contractors, Inc., d/b/a M & M Contractors is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Carpenters Local No. 266, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. A unit appropriate for collective bargaining is:

> All full-time and regular part-time employees employed by M & M Building and Electrical Contractors, Inc., d/b/a M & M Contractors; excluding office clerical employees, guards and supervisors as defined in the Act.

4. At all times material, Carpenters Local No. 266, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, has been the exclusive collective-bargaining representative of the employees in the above-described appropriate unit within the meaning of Section 9(a) of the Act.

5. By refusing to bargain with and by withdrawing recognition of Carpenters Local No. 266, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the collective-bargaining representative of the employees in the appropriate unit described in Conclusion of Law 3 above, on and after November 26, 1980, M & M Building and Electrical Contractors, Inc., d/b/a M & M Contractors violated Section 8(a)(5) and (1) of the Act.

7. M & M Building and Electrical Contractors, Inc, d/b/a M & M Contractors has not violated the Act in any other manner.

THE REMEDY

Having found that M & M Building and Electrical Contractors, Inc., d/b/a M & M Contractors engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and that certain affirmative action be taken to effectuate the policies of the Act. With regard to the latter, I shall recommend that M & M Building and Electrical Contractors, Inc., d/b/a M & M Contractors be ordered to resume recognizing and bargaining with Carpenters Local No. 266,

United Brotherhood of Carpenters and Joiners of America, AFL–CIO, as the representative of its employees in the appropriate unit described in Conclusion of Law 3 above.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[17]

The Respondent, M & M Building and Electrical Contractors, Inc., d/b/a M & M Contractors, Stockton, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with Carpenters Local No. 266, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, as the exclusive bargaining representative of all employees in the following appropriate bargaining unit:

> All full-time and regular part-time employees employed by M & M Building and Electrical Contractors, Inc., d/b/a M & M Contractors; excluding office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, recognize and bargain collectively with Carpenters Local No. 266, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, as the exclusive representative of all employees employed in the above-described appropriate bargaining unit, respecting rates of pay, wages, hours, or other terms and conditions of employment, and should any understandings be reached, embody such understanding in a signed agreement.

(b) Post at its Stockton, California, facility copies of the attached notice marked "Appendix."[18] Copies of said notice on forms provided by the Regional Director for Region 32, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this notice.

The Act gives all employees the following rights:

> To organize themselves
> To form, join, or support unions
> To bargain as a group through representatives of their own choosing
> To act together for collective bargaining or other mutual aid or protection
> To refrain from any or all such activity except to the extent that the employees' bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT refuse to recognize and bargain collectively with Carpenters Local No. 266, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, as the exclusive bargaining representative of all employees in the following appropriate bargaining unit:

> All full-time and regular part-time employees employed by M & M Building and Electrical Contractors, Inc., d/b/a M & M Contractors; excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with any of your rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL, upon request, recognize and bargain collectively with Carpenters Local No. 266, United Brotherhood of Carpenters and Joiners of America, AFl–CIO, as the exclusive bargaining representative of all employees in the above-described bargaining unit, respecting rates of pay, wages, hours of employment and other terms and conditions of employment, and, if any understandings be reached, embody them in a signed contract.

> M & M BUILDING AND ELECTRICAL CONTRACTORS, INC., D/B/A M & M CONTRACTORS

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[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[18] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."